Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

JF HOTEL MANAGEMENT,

Petitioner,

versus

THOMAS FLYNN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), be interpreted to permit a claim alleging disability discrimination to be sent to the jury, or a jury verdict for the plaintiff upheld, where, although there is some evidence to show that the employer's proffered legitimate reason for the discharge is pretextual, there is no evidence, in a *prima facie* case or otherwise, that the true reason for the discharge was disability discrimination?

2. Should a claim alleging disability discrimination be submitted to the jury, or a jury verdict for the plaintiff upheld, where there is no evidence to create a presumption of discrimination on the basis of disability, apart from the subjective impression of the plaintiff formed in a single hand-shake encounter?

CERTIFICATE OF INTERESTED PARTIES

In compliance with this Court's Rules 14(b) and 29.6, Petitioner JF Hotel Management lists the following parties, parent companies and non-wholly owned subsidiaries in addition to the interested parties already listed in the caption of this case:

1. Akerman, Senterfitt & Eidson, P.A.
2. Avel Hotels of Naples, Inc.
3. Peter Burkert, Esq.
4. Burkert & Hart, P.A.
5. Anthony Cuva, Esq.
6. Robert Donald, Esq.
7. Honorable Patricia Fawsett
8. Thomas Flynn
9. Carol Burkett Hawkins, Esq.
10. Humphrey & Knott, P.A.
11. Innkeepers Hospitality, Inc.
12. JF Hotel Management
13. JF Hotels, Inc.
14. Stokes & Murphy, P.C.
15. Arch Stokes, Esq.
16. H. Andrew Swett, Esq.
17. Karl Terrell, Esq.

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OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court judgment without opinion. The order affirming the judgment is reproduced in the Appendix at "A". The opinion of the United States District Court for the Middle District of Florida denying Petitioner's Motion for Judgment as a Matter of Law following the jury's verdict is reproduced in the Appendix at "B". The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing En Banc is reproduced in the Appendix at "C".

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its order affirming the judgment below on October 8, 1999. The Petition for Rehearing En Banc of J. F. Hotel Management was denied on December 15, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 12112(a) provides, in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee

compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

A. Facts

Defendant-Appellant J. F. Hotel Management (hereinafter "JFHM") operated the Hampton Inn in Naples, Florida (hereinafter "the Hotel"). Denis Longchamps, the General Manager of the Hotel, hired the Plaintiff-Appellee, Thomas Flynn, as a maintenance engineer on November 1, 1990. Mr. Flynn was subsequently promoted to the position of Rooms Manager.

Mr. Flynn lost the middle three fingers of his right hand when he was a boy, but there is no dispute that he was able to and did perform his duties competently and well until the last day of his employment by JFHM.[1] There is no issue in this case as to whether Mr. Flynn required or was denied a reasonable accommodation. Instead, this is a discrimination case based solely on Mr. Flynn's characteristic of possessing a physical disability.

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[1] The parties stipulated prior to the trial that "plaintiff has a disability involving amputation to the fingers of his right hand." JFHM at no time conceded that this stipulation waived its right to prove that plaintiff's amputated fingers did not render him impaired in the performance of a major life activity. JFHM then sought, but was denied, permission to withdraw that stipulation prior to trial. That order of the district court was not appealed to this Court. Thus, for purposes of this Petition, it is assumed that Mr. Flynn is a disabled person.

Mr. Flynn's claim of discrimination derives from a single encounter with an executive of JFHM, John Langley. John Langley has been employed by JFHM since 1992, starting out as a hotel General Manager and, at the time he met Mr. Flynn, he held the position of JFHM's Director of Operations, overseeing numerous hotels, including the Hotel in which Mr. Flynn worked. Mr. Langley was appointed to the Director of Operations position in the spring of 1994, shortly before the company became a publicly traded company. In preparation for the pending public scrutiny of the company's hotels, Mr. Langley visited all of the hotels under his supervision in order to help them standardize their operations.

Mr. Langley met Mr. Flynn for the first time in April of 1994, when he visited the Hotel shortly after assuming his new position as Director of Operations. There is no dispute that the two men shook hands at that meeting.

Mr. Flynn testified that when he shook hands with Mr. Langley, Mr. Langley "gave like a re-coil and actually like astonished look." He also testified: "I have had different encounters shaking hands with somebody, and I know when somebody, you know, really [a]ffects them badly and they don't like it, whatever."

The foregoing was literally the *only* "evidence" of anti-disability animus produced by Mr. Flynn during the entire trial. Mr. Langley denied having such a reaction, and it is notable that the hand-shaking incident made absolutely no impression on Mr. Longchamps, who was present at the time. Longchamps, when he testified, could

not even recall whether Mr. Langley indicated awareness of Mr. Flynn's disability.[2]

After the two men shook hands, they, along with Mr. Longchamps, proceeded with the inspection of several rooms of the Hotel. At no time during this forty-five minute inspection did Mr. Langley say anything negative with respect to Mr. Flynn or his work performance, or make any mention of Mr. Flynn's hand.

Mr. Flynn next saw Mr. Langley about two weeks later, in the lobby of the Peabody Hotel in Memphis. Mr. Flynn had received the Hampton Inn's President's Award, and the company had paid for him and his wife to attend the presentation ceremony at that hotel. There were thousands of people from JFHM at the convention in the hotel. Mr. Langley saw Mr. Flynn and his wife in the lobby of the hotel. Mr. Langley did not recognize Mr. Flynn at first, and was unaware that Mr. Flynn was to receive the President's Award. This was the last time Mr. Flynn ever saw Mr Langley prior to this litigation.

On the morning of June 9, 1994, two months after his first meeting and handshake with Mr. Flynn, Mr. Langley called the Hotel to deal with some mistakes that were being made in filling out expense reports. Denis Longchamps was in Tampa for a sales conference, and the

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[2] Mr. Longchamps was not called as a witness in the trial; however, the trial judge permitted Plaintiff's counsel to read most of Mr. Longchamps's deposition into the record. Because JFHM did not have counsel present at Mr. Longchamps's deposition, it never had the opportunity to cross-examine him or to object to the numerous leading questions asked by Mr. Flynn's counsel.

Assistant General Manager, Amy McNichols Longchamps (Denis Longchamps's sister-in-law), had not yet come in when Mr. Langley called. Mr. Flynn was therefore the most senior manager on the property, and Mr. Langley asked to speak to him. Some of the evidence of what happened next is in dispute; however, as shown below, there are also significant *undisputed* facts. According to Leticia Gerbec, who was the front desk clerk on that day and took the call from Mr. Langley, Mr. Langley explained that he wanted to fax a copy of the expense report to Mr. Flynn and have him call back to discuss it. Ms. Gerbec spoke to Mr. Flynn, but he initially refused to comply with Langley's request. She testified that Mr. Langley became upset when informed of Mr. Flynn's reaction. He then asked her again to have Mr. Flynn call him. Shortly thereafter, Mr. Flynn called and spoke to Mr. Langley.

Mr. Flynn admitted that Mr. Langley indeed wished to fax him a copy of an expense report in order to explain the correct manner of filling it out. Mr. Flynn also admitted that he expressed some reluctance to do what was asked of him, believing that this kind of thing was not his job, even though it is undisputed that he was at that moment the highest-ranking manager on the property. Mr. Flynn testified that he paged Denis Longchamps, who allegedly told Mr. Flynn not to worry about the expense report. Mr. Flynn also testified that he told Mr. Longchamps he wasn't feeling well and might go to the doctor about his blood pressure.

Mr. Longchamps, who appeared as a witness for Mr. Flynn, testified that his first involvement in the incident occurred when he received a phone call from his wife

Celeste, the Hotel's breakfast hostess. Celeste informed him that Mr. Flynn was very upset about something and was "ready to walk out of here." Mr. Longchamps testified that the next phone call he received was from Mr. Langley, who was extremely upset that Mr. Flynn had refused to work on the expense report with him. According to Mr. Longchamps, Mr. Langley told Mr. Longchamps to write up Mr. Flynn for insubordination, which Mr. Longchamps said he refused to do until he got back to the Hotel and figured out what was going on. He then told Mr. Langley, either in the same conversation or in another conversation shortly thereafter, that Mr. Flynn was "ready to walk out of the hotel right now if he's not already gone."

Leticia Gerbec testified that Mr. Flynn had indeed quit. She testified that after Mr. Flynn went to call Mr. Langley, following the second request to do so, he emerged in an angry mood, saying it "wasn't fair," saying that he "quit", and walking out the front door. Ms. Gerbec testified that she called both John Langley and Denis Longchamps to inform them of this.

It is undisputed, therefore, that Mr. Langley was informed by both Mr. Longchamps and Ms. Gerbec that Mr. Flynn was "walk[ing] out" and "quit[ting]". This is what Mr. Langley believed, as Mr. Longchamps confirmed when he testified to a *subsequent* conversation with Mr. Langley in which Mr. Langley stated his belief that Mr. Flynn had quit.

Acting on this belief, Mr. Langley called his superior, Fred Shaw, and the two of them agreed that if Mr. Flynn,

who was at that moment the highest-ranking management person on property in the Hotel, had walked off the job, his pager and keys should be collected and he should be allowed to leave. Mr. Langley then called the Hotel and instructed Assistant General Manager Amy McNichols Longchamps, who had since come in to the Hotel, to relieve Mr. Flynn of his pager and keys. These two conversations – with Shaw and with Ms. Longchamps – occurred *after* Mr. Longchamps told Mr.Langley that Mr. Flynn was "ready to walk out of the hotel right now if he's not already gone," and after Ms. Gerbec told him that Mr. Flynn had quit.

Although some facts regarding the events of June 9, 1994 are in dispute, certain key points are undisputed. First, it is undisputed that Mr. Flynn, by his own admission at trial, was reluctant to cooperate in Mr. Langley's attempts to correct mistakes in the Hotel's expense reports, even though he was a manager of the Hotel. Second, it is undisputed that Denis Longchamps and Leticia Gerbec gave John Langley the impression – correctly or not – that Tom Flynn had quit his job, that he had walked off the Hotel property in the middle of his shift when he was the most senior manager on the property at the time. It is also undisputed that Mr. Langley's request to Amy McNichols that she relieve Mr. Flynn of his pager and keys occurred after Mr. Langley's conversations with Mr. Longchamps and with Ms. Gerbec indicating that Mr. Flynn had quit.

Finally, it is undisputed that the subject of Mr. Flynn's disability never arose on that day – or on any other day prior to the commencement of this litigation.

Mr. Flynn did not recall whether he ever told Mr. Longchamps on the day of June 9 that he had not in fact quit. He definitely never told John Langley. Mr. Longchamps did not make any attempt to resolve the situation, believing from Mr. Langley's demeanor over the telephone that nothing could be done. Mr. Flynn never returned to work at the Hotel, although he was offered unconditional reinstatement shortly before the trial.

Mr. Flynn never introduced any evidence that he was replaced in his job by a non-disabled person. Moreover, even Mr. Flynn's counsel acknowledged that JFHM had no history of discrimination against persons with disabilities.

B. Procedural History and Basis of Jurisdiction In The First Instance

The complaint in this case was originally filed on June 22, 1995, alleging disability discrimination in employment in violation of the Americans with Disabilities Act, 42 U.S.C. § 12201, *et seq.*, and the Florida Civil Rights Act, Fla. Stat. ch. 760. The complaint was filed against Avel Hotels, Inc., the former owner of the Hampton Inn in Naples, Florida, and against present Defendant-Appellant J. F. Hotel Management, the management company that runs the hotel.

J. F. Hotel Management moved to dismiss the complaint or for summary judgment on July 31, 1995, which motion was denied on December 8, 1995. J. F. Hotel Management then answered the Complaint on January 29, 1996. Avel Hotels answered the Complaint on August

4, 1995, but a default judgment was ultimately entered against Avel on February 4, 1997.

On December 24, 1996, J. F. Hotel Management moved to permit Regina Alberini Young to withdraw as its attorney. That order was granted on February 18, 1997. Present counsel, Stokes & Murphy, entered an appearance on May 8, 1997. J. F. Hotel Management again moved for summary judgment on December 1, 1997. That motion was denied on April 20, 1998.

The trial of this case occurred on June 2-4, 1998, before Judge Patricia C. Fawsett. J. F. Hotel Management moved for directed verdict at the close of the plaintiff's case and at the close of all the evidence. Plaintiff also moved for directed verdict at the close of all the evidence. All directed verdict motions were denied, and the case was submitted to the jury. The jury returned a verdict in favor of the plaintiff on June 4, 1998. Judgment was entered on the verdict on June 8, 1998.

J. F. Hotel Management moved for judgment as a matter of law or for new trial on June 22, 1998. On August 27, 1998, Judge Fawsett denied this motion. A Notice of Appeal was filed by J. F. Hotel Management on September 8, 1998, and then amended on September 15, 1998.

The Court of Appeals for the Eleventh Circuit affirmed the judgment without opinion on October 7, 1999. J. F. Hotel Management petitioned for a Rehearing En Banc on October 28, 1999.

On November 24, 1999, after certiorari was granted by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 444 (Nov. 8, 1999), counsel for

J. F. Management sent a letter to the Court of Appeals noting this Court's grant of certiorari in that case and urging the Court of Appeals to await the decision of this Court before rendering a decision on the Petition for Rehearing En Banc. Nevertheless, on December 15, 1999, the Court of Appeals denied the Petition for Rehearing En Banc.

REASONS FOR GRANTING THIS PETITION

The ruling of the Eleventh Circuit in this case conflicts directly with the opinion issued by the Fifth Circuit in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 98-60334, slip op. (5th Cir. Apr. 22, 1999) (per curiam), *cert. granted*, ___ U.S. ___, 120 S.Ct. 444 (Nov. 8, 1999), in which this Court has already granted a writ of certiorari. The different outcomes of *Reeves* (granting a Motion for Judgment as a Matter of Law despite a jury verdict for the plaintiff) and the present case (denying a Motion for Judgment as a Matter of Law in the face of a jury verdict for the plaintiff) reflect the split among the Circuits in their interpretation of this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Petitioner J. F. Hotel Management respectfully requests this Court to grant a writ of certiorari in the present case also so that it may decide this case either on its own or as a companion case with *Reeves*, utilizing both cases to clarify its opinion in *Hicks* and the quantum of proof necessary to prove a discrimination case. Petitioner submits that the case *sub judice* will be helpful to this Court in deciding this issue given the differentiation in

the facts – specifically, that the quantum of evidence of discriminatory animus in the case *sub judice* is much lower than in *Reeves*.

In the alternative, Petitioner requests that this Court hold this case and defer its ruling on this petition until this Court delivers its judgment in *Reeves* and then refer this case back to the Eleventh Circuit with instructions to review it in light of this Court's ruling in *Reeves*.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING HOW MUCH EVIDENCE A PLAINTIFF MUST SUBMIT IN ORDER TO PROVE THAT HIS DISCHARGE RESULTED FROM DISCRIMINATION AND NOT FROM SOME OTHER FACTOR.

As described in Reeves's Petition for Writ of Certiorari at 4-7, a split has developed among the Circuits regarding how to interpret this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The Eleventh Circuit Court of Appeals and others have hewed to this Court's language in *Hicks* that, once a prima facie case is established, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . '[n]o additional proof of discrimination is *required*.' " 509 U.S. at 511 (emphasis in original, citation omitted). *See, e.g., Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998). These Courts therefore always refuse summary judgment and judgment as a matter of law if a plaintiff can provide a prima facie case and introduce some evidence casting doubt upon the

employer's proffered reasons for the disputed employment action.

The Fifth Circuit Court of Appeals, whose opinion in *Reeves* this Court has agreed to review, has held, by contrast, that a prima facie case alone, even coupled with evidence that the employer's proffered legitimate reason for the disputed employment action is pretextual, may not always be sufficient to avoid judgment as a matter of law. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc). The Court of Appeals in *Rhodes* concluded that "if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent." 75 F.3d at 994. *See also Hicks*, 509 U.S. at 515 (emphasis in original): "[A] reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason;" and at 514-515: "[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." Other Circuits interpret *Hicks* in accord with the Fifth Circuit. *See, e.g., Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995).

Consistently with this approach, the Fifth Circuit Court of Appeals held in *Reeves*: "[W]hether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether

Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." *Reeves, supra,* slip op. at 9. Concluding that he did not, the Court reversed the judgment in his favor.

In the present case, by contrast, the Eleventh Circuit Court of Appeals let stand a jury verdict in favor of the plaintiff based entirely on evidence of pretext (the impeachment, to some degree, of J. F.'s witnesses) plus Flynn's own subjective impression that, some months prior to Flynn's discharge, John Langley had "recoiled" upon shaking Flynn's deformed hand. Had the Fifth Circuit Court of Appeals decided this case, there can be little doubt that the judgment would have been reversed. Despite whatever impeachment occurred of J. F.'s witnesses at the trial of this case, the fact remains that there was no evidence that Flynn's "[disability] motivated [J. F.'s] employment decision." *Cf. Reeves, supra,* slip op. at 9.

Petitioner J. F. Hotels submits that the Eleventh Circuit, and numerous other Courts, have misinterpreted this Court's opinion in *Hicks* by parsing too closely the language that a prima facie case plus rejection of the defendant's proffered reasons "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination", 509 U.S. at 511, and ignored this Court's admonition in the same opinion that "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." 509 U.S. at 515.

II. THE PRESENT CASE ALSO PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY WHAT EVIDENCE IS NECESSARY TO SUPPORT A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION, AND WHETHER THE PLAINTIFF'S SUBJECTIVE IMPRESSION IS SUFFICIENT TO SUPPORT EITHER A PRIMA FACIE CASE OR A JURY VERDICT OF DISABILITY DISCRIMINATION.

As discussed above at 4-5, the sole evidence presented by Flynn to link his disability to his discharge was his own subjective impression at his first meeting with John Langley that Langley "gave like a re-coil and actually like astonished look," and his statement: "I have had different encounters shaking hands with somebody, and I know when somebody, you know, really [a]ffects them badly and they don't like it, whatever." Flynn was discharged a few months later under circumstances which are confused, but the undisputed facts support J. F.'s position that Langley believed Flynn had walked off the job. It is in any event undisputed that the subject of Flynn's disability was never raised by Langley (or anyone else at J. F. Hotels) at any time to anyone prior to Flynn's discharge. Flynn never even presented evidence as to whether or not he was replaced by a non-disabled individual.

At the trial of this case, counsel for J. F. Hotels moved for a directed verdict following the presentation of the plaintiff's case-in-chief, asserting that Flynn had failed even to make out a prima facie case of disability discrimination. The trial judge denied the motion, requiring J. F.

Hotels to put on its defense. Petitioner J. F. Hotels submits that the trial judge erred, because Flynn's evidence was insufficient even to raise a rebuttable inference that his disability played a role in his discharge.

As this Court has held, the purpose of the prima facie case in a discrimination action is to raise a rebuttable presumption that unlawful discrimination played a role in the disputed employment decision. "Establishment of a *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The presumption of discrimination must be strong enough so that, if the presumption is not rebutted by the employer's evidence that lawful reasons underlay the decision, judgment for the plaintiff would be proper. "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* *See also Hicks, supra*, 509 U.S. at 506 (citation omitted) (" '[A] presumption' . . . is 'a required conclusion in the absence of explanation.' ")

If the judgment in the present case is permitted to stand, it will establish that a plaintiff's subjective belief that his employer had a negative reaction to his disability is alone sufficient to raise the presumption that his disability caused his discharge. Petitioner submits that this extreme holding should not be allowed to stand, and requests that this Court offer some guidance to courts and litigants regarding the minimum standard of proof necessary to raise a presumption of discrimination.

CONCLUSION

By granting certiorari in *Reeves*, this Court has already acknowledged the importance of resolving the split in the Circuits regarding *Hicks*. The present case is a companion to *Reeves*, demonstrating how the differing interpretations of *Hicks* yield different results in similar cases. This Court must establish clearer standards defining the minimum evidence necessary for a discrimination plaintiff to avoid judgment as a matter of law. This case presents the additional issue, moreover, of what minimum evidence is necessary for a discrimination plaintiff to supply a prima facie case. In the present case, the subjective impression of the plaintiff was alone held sufficient. Given the large number of discrimination cases in federal courts – and the increasing number of disability cases among those – it is crucial that this Court offer some guidance to district courts on this issue as well.

Petitioner J. F. Hotels therefore respectfully requests that this Court grant certiorari in the present case, or, in the alternative, hold this case until this Court renders its decision in *Reeves*.

For the reasons stated, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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J. F. Hotel Management

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3271

D. C. Docket No. 95-00208-CV-FTM-26D

THOMAS FLYNN,

Plaintiff-Appellee,

versus

AVEL HOTELS OF NAPLES, INC., a Florida corporation,

Defendant,

JF HOTEL MANAGEMENT, a Florida corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(October 7, 1999)

Before CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge.

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*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

THOMAS FLYNN,

Plaintiff,

v. CASE NO.95-208-CIV-FTM-21D

JF HOTEL MANAGEMENT,
a Florida corporation,

Defendant.

_____/

ORDER

This cause came before the Court on the following matters:

1) Plaintiff's Motion for Attorneys' Fees & Litigation Expenses (Doc. No. 128, filed June 22, 1998), Plaintiff's Memorandum in Support of Motion for Attorneys' Fees & Litigation Expenses (Doc. No. 129, filed June 22, 1998), and the Opposition of J.F. Hotel Management to Plaintiff's Motion for Attorneys' Fees and Litigation Expenses (Doc. No. 139, filed July 10, 1998) are hereby **REFERRED** to the United States Magistrate Judge for Report and Recommendation.

2) Plaintiff's Motion to Amend Judgment and Memorandum of Law in Support of the Motion (Doc. No. 130, filed June 22, 1998) is **GRANTED.**

3) Motion of Defendant, JF Hotel Management for Judgment as a Matter of Law or, in the Alternative, for New

Trial and Memorandum of Law in Support (Doc. No. 131, filed June 22, 1998),[1] and Plaintiff's Memorandum in Opposition to JF Hotel's Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial (Doc. No. 138, filed July 9, 1998).

Defendant JF Hotel Management has moved for judgment as a matter of law or, in the alternative, for a new trial based upon five grounds: 1) there was no competent evidence that any discriminatory motive played a role in the events leading to the termination of Plaintiff; 2) Plaintiff should not have been permitted to read the deposition of Dennis Longchamps into the record; 3) Defendant should have been permitted to withdraw its stipulation that Plaintiff was disabled; 4) the jury improperly awarded Plaintiff front pay; and 5) the jury improperly awarded punitive damages.

Federal Rule of Civil Procedure 50 (a) requires that a motion for judgment as a matter of law made during trial specify the grounds for granting the motion. Litigants may not base a post-trial Rule 50(b) motion for judgment as a matter of law on a ground that was not included in a prior motion for judgment as a matter of law. *See e.g., Redd v. City of Phenix City, Ala.*, 934 F.2d 1211, 1214 (11th Cir. 1991); *Williams v. Runyon*, 130 F.3d 568, 571-72 (3d Cir. 1997); *McCann v. Texas City Refining, Inc.*, 984 F. 2d 667, 672 (5th Cir. 1993); *U.S. Industries Inc. v Blake Constr. Co., Inc.*, 671 F.2d 539, 548 (D.C. Cir. 1982); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995).

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[1] Defendant has filed this motion and memorandum in duplicate. *See* Doc. Nos. 136 & 137, filed June 24, 1998).

At the close of Plaintiff's case, Defendant moved for judgment as a matter of law based upon Plaintiff's inability to establish a prima facie case through his failure to produce evidence showing that his "termination was based on disability." (Transcript, Doc. No. 138 at app. 12). At the close of all of the evidence, Defendant renewed its motion for judgment as a matter of law by stating the following:

> Defendant renews their motion for directed verdict . . . Plaintiff has failed to establish . . . sufficient evidence to meet the prong of the prim[a] facie case, that the separation from employment was based on disability discrimination because of disability discrimination.

(Transcript, Doc. No. 138 at app. 38). Neither at the close of Plaintiff's case, nor at the close of all the evidence, did Defendant make a motion for judgment as a matter of law with regard to Plaintiff's inability to show pretext or with regard to grounds two through five above which Defendant attempts to assert in this post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. Thus, Defendant has waived ground one of its current motion, to the extent that ground one asserts insufficient evidence of pretext, and has also waived grounds two through five as bases for post trial judgment as a matter of law. Nevertheless, because Defendant may move for a new trial under Federal Rule of Civil Procedure 59 based on evidentiary grounds without previously having raised specific objections to the Court, the Court will consider the merits of Defendant's evidentiary arguments for a new trial. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656 (8th Cir. 1995).

Defendant has wholly failed to show that it is entitled to judgment as a matter of law on Plaintiff's establishment of a prima facie case or that it is entitled to a new trial based on any of the grounds asserted, whether evidentiary or not. Only Defendant's arguments relating to sufficiency of the evidence and punitive damages merit discussion.

Plaintiff clearly presented evidence meeting the elements of a prima facie case of disability discrimination. This case presented conflicts in the evidence which the jury resolved in accordance with the law. The body language, the tone of the witnesses' testimony, and the manner in which the testimony was given support the verdict of this jury in addition to the specific words used. Persons who discriminate on the basis of disability seldom are forthright about, or acknowledge, their actions. This is one reason the laws against impermissible discrimination in the workplace are important. This case represents a factual situation which the ADA was designed to redress.

Whether the evidence is sufficient to support an award of punitive damages is a question of law. *See, e.g., Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1384 (10th Cir. 1989). Defendant made no objection at trial to submission of the issue of punitive damages to the jury. Post-trial, Defendant contends that the evidence was insufficient to justify an award of punitive damages against Defendant corporation based upon the acts of one "rogue" employee. The Court does not agree.

Punitive damages are available where the Plaintiff demonstrates that the employer "engaged in . . . discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a. Constructive knowledge of discrimination on the part of the employer is not enough to justify an award of punitive damages. *See Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996). However, an award of punitive damages against the employer may be appropriate where the employee is a member of higher management or the employee's acts were authorized or approved, implicitly or explicitly, by the employer. *See id.* at 491-92.

In this case, John Langley was not just a low-level, "rogue" employee whose actions had no bearing on the state of mind of his corporate employer. Langley was a member of higher management in Defendant corporation such that his actions and state of mind could be equated with that of Defendant corporation. Langley was Director of Operations of Defendant corporation with 3,500 employees under his management, he answered directly to the company's president, his office was at corporate headquarters, he was secretary of the corporation, and he actually wrote the mission statement for the corporation. (Transcript, Doc. No. 138 at app. 4, 27, 28, 30, 31, & 36; Plaintiff's Exh. D at app. 53) . In fact, Langley was the corporate representative at trial. Langley's position in the corporate hierarchy was such that his discriminatory actions could be viewed as being those of the corporation or as being implicitly authorized or approved by Defendant corporation. Furthermore, it appeared that not only

was there discrimination on the basis of Plaintiff's disability but also that such discrimination was knowing and willful at the time it occurred based on the events that transpired and the Defendant's version of those events, which the jury did not believe.

The jury's verdict was appropriate. The motion of Defendant, JF Hotel Management, for Judgment as a Matter of Law or, in the Alternative, for New Trial is **DENIED.** Defendant's duplicate motion (Doc. No. 136) is **MOOT.**

DONE AND ORDERED at Orlando, Florida this, 26th day of August, 1998.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:
All Counsel of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3271-BB

THOMAS FLYNN,

Plaintiff-Appellee,

versus

JF HOTEL MANAGEMENT, a Florida corporation,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Dec. 14, 1999)

Before: CARNES and BARKETT, Circuit Judges, and PAINE*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE